TOTAL DISABILITY IN ACCIDENT INSURANCE.

THE holder of an accident insurance policy is insured, so runs the policy of the day, "against loss of time not exceeding twenty-six weeks resulting from bodily injuries effected through external, violent, and accidental means which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation."

In what cases will the courts rule that he is totally disabled within the meaning of this policy? Do these words mean that to recover he must be so disabled as to be prevented from doing anything whatsoever pertaining to his occupation, or any part of his business pertaining to his occupation, or must he be so disabled as to be prevented from doing any and every kind of business pertaining to his occupation? In other words, is there a difference in being able to perform any part of one's business, and any and every kind of business pertaining to one's occupation?

For instance, suppose that the insured was a billiard-saloon keeper, that he could do some of the acts necessary to be done in the business of billiard-saloon keeper, but was wholly disabled from doing many of the material acts necessary to be done in that business. Is such a man "totally disabled" within the meaning of the policy as interpreted by the courts?

Or, again, suppose the case of a merchant grocer seriously injured in his foot, who after a few days of confinement in the house was able with great exertion to get into his buggy and superintend a small part of his business, though for the whole period of twenty-six weeks he was unable to do substantially all kinds of his accustomed labor to some extent. Can he recover under such a policy?

As the great majority of accidents do not incapacitate a man from all labor whatsoever, but often leave him in a condition to perform some work, though it may be a very small part of his regular duties, it is a question of importance whether under such

circumstances the insurance companies will be obliged to pay the holders of their policies the weekly allowance provided for by the contract.

The law on this point is unsettled. The Supreme Court of Wisconsin has recently decided, in the case of the merchant grocer just put, that the insured could not recover; and the Supreme Court of Maine, about a year later, in the case of the billiard-saloon keeper, reached an opposite conclusion.

An examination of the earlier cases is instructive, as they have exerted a considerable influence upon the present state of the law, although the language of the policies passed upon in them is materially different from the language of the policy in general use to-day.

The first case — at least the first of any importance — was Hooper *v.* Accidental Death Insurance Company, 5 H. & N. 545, decided in 1860.[1]

In this case the policy of insurance against accident held by the plaintiff contained this clause, "that in case such accident shall not cause the death of the injured immediately, but shall cause any bodily injury to the injured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits, the company will pay to the said insured," etc.

The injured party was a solicitor, registrar of a county court, and clerk to the Guardians of the Poor. He sprained his ankle so seriously that he was unable to put his foot to the ground, or to leave his room, for some weeks. During this time, however, he could give directions to his clerk, write letters, etc., while lying on his sofa; but he could not pass his accounts as registrar, or keep any of his engagements with his clients. The court held that the plaintiff could recover. Pollock, C. B., referring to the policy, said: —

"We must, therefore, endeavor to find out what is the true meaning of the language used in the policy. It may well be that the sense intended to be conveyed was, that if the person insured should be wholly disabled from carrying on his business as he usually carried it on, the company would be liable. That is the case here: the plaintiff might

[1] It should be remembered that the business of accident insurance is of comparative recent origin. Its growth within the last few years, however, has been surprising. One company alone has paid out over a million dollars in accident claims within the last year.

and could have done something which he was in the habit of doing before, but he was wholly incapable of doing that which he usually did before. If a man is so incapacitated from following his usual business, occupation, or pursuits as to be unable to do so, he is 'wholly disabled' from following them. His 'usual business and occupation' embrace the whole scope and compass of his mode of getting his livelihood."

The decision was subsequently affirmed by the Exchequer Chamber, 5 H. & N. 556.

This case was followed in Sawyer *v.* The United States Casualty Company, 8 Am. Law Reg. N. S. 233, decided in 1869 in the Superior Court of Massachusetts. The plaintiff, a farmer, was injured by a fall. He was obliged to hire a man to do what he formerly did, although he could still do some light work, such as milking, riding about the farm, and superintending the work. His policy read, "absolutely and totally disable him from the prosecution of his usual employment." The plaintiff recovered, under the following instruction of the court: "The mere fact that a man cannot do a whole day's work, or that by a day's work he cannot accomplish so much as before the accident, is not sufficient to entitle him to recover, but he must satisfy you that for a time, by reason of his accident, he is deprived of the power to do to any extent substantially all the kinds of labor which constituted his usual employment."

In 1877, Lyon *v.* The Railway Passenger Assurance Company, 46 Ia. 631, was decided. This was a one-day policy, reading, "totally disabled and prevented from the transaction of all kinds of business." The court below said that this language, construed in a practical sense, meant inability to follow any occupation, business, or pursuit, in the usual way, and that the fact that the plaintiff may do some light parts of the work when he cannot engage in the work itself to any practical extent, will not prevent a recovery. The court reversed this instruction in the following opinion: —

"These instructions are, it seems to us, clearly erroneous. The parties must be bound by the terms of their contract. The contract of insurance provides that the defendant will indemnify the assured against loss of time while *totally disabled and prevented* from the transaction of *all kinds* of business solely by reason of bodily injuries effected through outward accidental violence. The fourth instruction

construes the contract to mean something entirely different. The jury are directed that plaintiff may recover though he may be able to do some parts of the accustomed work pertaining to his business, so long as he cannot to some extent do all parts and engage in all the employments thereof. Almost total soundness and ability, instead of total disability, is made the condition of plaintiff's right to recover, and of defendant's liability. The plaintiff is a carpenter. If he was simply disabled from going upon a four-story building to put on the roof, and could do everything else pertaining to his trade, he would under this instruction be entitled to recover fifteen dollars a week during the period of such disability. This is not the proper construction of the agreement. It interpolates into it terms and conditions upon which the parties never agreed, and attaches to the words employed a meaning of which they are not susceptible."

In Saveland *v.* Fidelity and Casualty Company, 67 Wis. 174 (1886), the case of the grocer referred to *supra*, the judge ruled at the trial that the plaintiff was entitled to recover for such time as by reason of the accident he was "rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent." The court reversed this ruling, holding that "the plaintiff's right to recover is necessarily restricted to the time he was wholly disabled and prevented from the prosecution of any and every kind of business pertaining to his occupation," and cited with approval Lyon *v.* Railway Passenger Assurance Company, *supra*.

In Young *v.* Travelers Insurance Company, 80 Me. 244 (1888), the case of the billiard-saloon keeper, the court below ruled that the meaning of the language was, "not that he must be so disabled as to prevent him from doing anything whatsoever pertaining to his occupation, or to any part of his business pertaining to his occupation as billiard-saloon keeper, but that he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation. There may be a difference between being able to perform any part of his business and any and every kind of business pertaining to his occupation." The court upheld these instructions, saying, "He was not able to prosecute his business unless he was able to do all the substantial acts necessary to be done in its prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform one only,

he was as effectually disabled from performing his business as if he could do nothing required to be done; and while remaining in that condition he would suffer loss of time in the business of his occupation." Hooper *v.* Accidental Death Insurance Company was relied on as an authority for the position taken. Saveland *v.* Fidelity and Casualty Company, although decided over a year previously, was not cited by court or counsel.

Such are the decisions of the courts on this subject.[1] The last two are the only ones which directly bear upon the interpretation of the policy in use at the present day, but the influence of the others can be felt in these.

The weight of authority, although slight, seems to be with the Wisconsin case. The vigorous language of the court in Lyon *v.* Railway Passenger Assurance Company leaves little room for doubt that it would have agreed with the Wisconsin court. On the other hand, it is hard to see how Hooper *v.* Accidental Death Insurance Company supports the decision of the court in Young *v.* Travelers Insurance Company. In the English case, and in the case in the Massachusetts Superior Court which followed it, the language of the policy was very loose. In the former, Wilde, B., said, "Surely 'wholly disabled' is equivalent to quite disabled, and a man is so unless he can do what he is called upon to do in the ordinary course of his business. It is not the same thing as '*unable to do any part of his business;*'" and Pollock, C. B., said, "It may be said that here there is a total loss of part as distinguished from a partial loss of the whole." In the policy before us, however, can it be said that the total loss of part is enough for a recovery when the requirement is that there should be a total loss of "any and every kind of business pertaining to the occupation"?

If the weight of authority seems to be with the Wisconsin court, still more does the weight of rhetoric, if I may use the expression, point to the conclusion reached by that court. "Business" means "that by which one earns a livelihood." "Occupation," though sometimes used synonymously, is a broader term. A man is a lawyer by occupation. His business, *i. e.*, "that which busies him," may be the arguing of cases, or it may be the preparation

[1] Rhodes *v.* Railway Passenger Insurance Company, 5 Lans. 77, and Accident Insurance Company *v.* Crandal, 120 U. S. 527, are often cited on the subject under discussion, but a careful examination of these cases will show that they are not in point.

of briefs, or the care of trust property, or the drawing of deeds, or the searching of titles. To recover, he must be totally disabled from doing any of these various kinds of business. Again, take the case of a country store-keeper who is accustomed to keep his books, wait on customers, make change, etc. Suppose that his knee is injured, but that he can be taken to his store daily, can sit at his desk, make change, keep his accounts, keep up his correspondence, etc., but is obliged to hire a clerk to wait upon his customers. He ought, perhaps, to be protected by an accident policy, but he is certainly not protected by one which says that he cannot recover unless he is totally disabled from the transaction of any and every kind of business pertaining to the occupation of store-keeper. Keeping the books, or making change, is certainly a "kind of business" which a store-keeper has to perform.

On the other hand, "business" must not be confounded with "labor." A lawyer can write letters; that is labor, but it is not a kind of business pertaining to his occupation. A typewriter, however, who can write letters, can pursue an important "business pertaining to his occupation." To recover, therefore, a man does not have to remain flat on his back, fearing that the raising of his hand will drive away the benefits of his policy. He can labor all he desires, as long as he does not perform, even partially, any kind of business pertaining to his occupation. From this point of view the policy is not such a "delusion and a snare" as the Supreme Court of Maine has seen fit to call it. But even so, the remedy is not for the courts to stretch the construction of the language beyond its meaning, so that "totally disabled" means "partially disabled," but rather for the public to force the insurance companies to issue policies for partial disability by refusing to buy the present "total disability" policy.[1]

Marland C. Hobbs.

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[1] NOTE. — If, for instance, the insured can show by doctors' certificates and other competent evidence that he can do but one-half the amount of work he formerly did before the accident, let him recover one-half the weekly allowance due on proof of total disability. The nearest approach to this, of which I know, is the provision for the payment of a certain sum in the case of the loss of an arm, a leg, or an eye.